IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 488

THE BARNES FOUNDATION,

Petitioner,

against

BERTRAND RUSSELL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

GERALD A. GLEESON,
605 East Allegheny Ave.,
Philadelphia, Pennsylvania;

SOIA MENTSCHIKOFF,
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New York, N. Y.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

A. Summary Statement of Matter Involved.

This case involves two basic issues:

1. The uniform administration of justice under the Federal Rules of Civil Procedure, more particularly Rules 43 and 56,* in accordance with the basic rights guaranteed by the Constitution; and

* These Rules are set out in full as Exhibit A hereof.

2. Control over and safety in office of persons employed as members of teaching staffs of our educational institutions.

The plaintiff herein is Bertrand Russell.

The defendant is The Barnes Foundation, a unique and experimental educational institution functioning in accordance with methods inspired by the educational conceptions of William James, John Dewey, and George Santayana (R. 156a). The quality and purposes of the work of this Foundation have been described by John Dewey in his Art as Experience:

> "Whatever is sound in this volume is due more than I can say to the great educational work carried on in the Barnes Foundation. That work is of a pioneer quality comparable to the best that has been done in any field during the present generation, that of science not excepted. I should be glad to think of this volume as one phase of the widespread influence the Foundation is exercising."

This unique Foundation in August, 1940 at the height of the then current controversy between Bertrand Russell and the College of the City of New York, employed Mr. Russell as a member of its teaching staff (R. 21a-22a). The letter of employment read as follows (R. 15a-16a):

> "August 16, 1940
>
> Mr. Bertrand Russell
> Fallen Leaf Post Office
> Lake Tahoe, California
>
> Dear Mr. Russell:
>
> We confirm herewith the verbal agreement made with you on August 8, 1940:—
>
> We agree to engage you as a member of the teaching staff of the Barnes Foundation at a salary of six thousand ($6,000) dollars per year, payable

in twelve (12) equal monthly installments, on the fifteenth day of each month.

The agreement is to extend for a period of five (5) years, dating from January 1, 1941. If, during the period of the aforesaid agreement, your personal affairs should make it necessary or advisable to terminate the contract, we agree that such a termination may be effected at the end of our school year; namely, May 31st.

Your service to the Foundation will consist of one lecture each week during the school year which extends from October 1st to May 31st inclusive, each lecture to be delivered in the gallery of the Barnes Foundation, at Merion, Pennsylvania.

Yours very truly,

ALBERT C. BARNES
President

THE BARNES FOUNDATION

PHILIP JENNEY
Witness

(SEAL)

CYNTHIA F. STINE
Witness

N. E. MULLEN
Secretary-Treasurer

I, Bertrand Russell, hereby agree to the terms and conditions of the above agreement entered into between myself and the Barnes Foundation.

HANS REISCENBACH
PAMELA CAMPBELL
Witnesses (2)

BERTRAND RUSSELL"

Several months later the compensation set forth in that letter was raised to $8,000 and the same letter with the amount changed was again signed by both parties (R. 6a-7a).

Two and one-half years later, after two full years of experience with the quality of the lectures given by Mr.

Russell and with Mr. Russell's conduct as a "member of the teaching staff," the Foundation terminated Mr. Russell's engagement (R. 7a). It did so for cause (R. 7a).

In an action subsequently brought by Mr. Russell for alleged breach of the letter agreement (the case at bar), Mr. Russell alleged generally that he had performed and was ready to perform all his duties under the agreement (R. 4a-5a). This allegation was, of course, denied (R. 13a-15a). The answer of the Foundation also specifically pointed out that Mr. Russell's conduct had not been that which was proper to "a member of the teaching staff" of the Foundation (R. 14a).

So far the litigation followed a normal course. Following joinder of issue, however, the course of this lawsuit became utterly fantastic.

Despite the fact that the discharge had been for cause, as was alleged in the answer, the Foundation was permitted by the Court below neither to explain what the duties of a member of its teaching staff were nor to explain what the required content of Mr. Russell's lectures was to be, nor to show the respects in which Mr. Russell had both failed to perform the duties inherent in his position as a member of the teaching staff and to give the type of lecture contemplated by the letter agreement. On the contrary, without any opportunity to the Foundation to present its evidence, summary judgment under Rule 56 was granted in favor of Mr. Russell on his bare statement that he had performed his duties.*

---

* The District Court's opinion appears at R. 32a-38a. Despite that Court's refusal to allow defendant any opportunity to present evidence on the meaning of the letter agreement it made a finding of fact that the subject matter of the "lecture" was to be "on the subject of the history of philosophy" although the agreement does not say so and that its preparation "required about one-half of the working time of the plaintiff." (R. 178a.) These findings were based on Mr. Russell's testimony alone.

This resulted from a conception and application of Rules 43 and 56 of the Federal Rules of Civil Procedure by the Third Circuit which is in conflict with previous decisions of this Court; which is in conflict with decisions in almost all the other circuits; and which is such a deprivation of the fundamental constitutional right to a fair hearing as to call for the exercise of this Court's general supervisory powers.

Unless reversed, the precedent set by this case will not only destroy the efficacy of the summary judgment procedure contemplated by the Rule 56 and of the liberalizing provisions of Rule 43 on the admissibility of evidence, but will also threaten all stability and progress in educational method in the institutions of higher learning in this country.

It is familiar knowledge that "teaching" or "lecturing" in an educational institution constitutes but a minor fraction of the responsibilities of the "members of the teaching staff." All educational institutions of the pioneer and progressive quality of The Barnes Foundation are constantly experimenting in methods of instruction and work and such experimentation necessarily demands the full cooperation of the members of its teaching staff. To hold, as has the Third Circuit, that no evidence of experimentation or general institutional objective and method is admissible to explain the duties of the members of teaching staffs unless previously spelled out in detail in a writing of employment, is to deprive educational institutions of all power to enforce standards which are basically impossible to describe in detail in a contract and yet which are as vital to the continued growth and welfare of the institutions as are the intangible standards for right conduct in judicial office. The more progressive, the more exploratory and the more democratic the institution is in its ideals and educational methods, the less possible is it to spell out the standards and duties

inherent in the assumption of a position on its teaching staff. Yet it is just such an institution whose work will be most affected by the action of the Third Circuit in this case. We, as a nation, cannot afford the stifling of such institutions.

Nor can any individual instructor feel safe against improper discharge under a precedent such as this which makes the letter of the writing, totally unexplained, the full and sole measure of his duty. The standard for him, as for the institution, must be the full broad standard of true education under the tradition of the institution, and neither the minutiae nor the unexplained generality of words alone. Only thus can "academic freedom" be maintained for both institution and individual.

The implications of the Third Circuit's decision on the relationship of educational institutions to their staffs alone warrant review and reversal by this Court. When we add to them the actual gross denial to The Barnes Foundation of all right to be heard on its side of the case because of a mistaken application of Rules 43 and 56, the situation becomes one which demands this Court's action.

B. Opinions Below.

The opinion of the District Court for the Eastern District of Pennsylvania dated May 17, 1943 is reported in 50 F. Supp. 174. It appears at R. 32(a) to 38(a).

The opinion of the District Court for the Eastern District of Pennsylvania, dated November 16, 1943, is reported in 52 F. Supp. 827. It appears at R. 177(a) to 184(a).

The opinion of the Circuit Court of Appeals for the Third Circuit, dated June 27, 1944, has not yet been reported. It appears at R. 192.

C. Jurisdiction.

The order for mandate, of the Circuit Court of Appeals for the Third Circuit, dated June 27, 1944 was received and filed in the District Court on September 14, 1944 (R. .....).

The plaintiff is a British subject; the defendant is a domestic corporation; the amount in controversy is $24,000. Original jurisdiction in the federal courts is based on 28 U. S. C. A. §41 (1).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C. A. §347(a) as amended by the Act of February 13, 1925, 43 Stat. 938.

D. Questions Presented.

1. Does the Court under Rule 56 of the Federal Rules of Civil Procedure have the power to determine conflicts of fact or is its power limited to determining whether an issue of fact exists?

2. In view of Rule 43 of the Federal Rules of Civil Procedure, are the federal courts bound by any state rules excluding evidence?

3. Are the federal courts free under Rule 43 of the Federal Rules of Civil Procedure to develop a uniform federal law of evidence?

4. Was the exclusion of the evidence offered by defendant on the question of the interpretation of the letter agreement correct?

5. Was the exclusion of the evidence offered by defendant on the issue of plaintiff's performance of the letter agreement correct?

6. Was defendant under the peculiar facts of this case deprived of the opportunity to be heard guaranteed by the Fifth Amendment?

E. Reasons Relied Upon for the Allowance of the Writ.

1. Interpretation of Rule 56 in Conflict with Interpretations by Other Circuits.

The evidence sought to be adduced by the Foundation as to the nature of Mr. Russell's performance appears at R. 146a-150a in the formal offers of proof under Rule 43 which were made at the hearing ordered on the question of damages after summary judgment had already been granted to Mr. Russell.

Typical is this offer (R. 150a):

> "Mr. Gleeson: Now then, I offer to prove that it was the established practice and part of the educational program of the Foundation for its lecturers to permit and encourage students to discuss the subject of the lecture during and after the period of the lecture, and that this was known to the plaintiff, and he refused to permit such (N. T. p. 127) discussion, but delivered his lectures in a perfunctory manner.
>
> Mr. White: I object to that as irrelevant, incompetent and immaterial, for the reason that it relates not to the question of damages, but to the question of whether the plaintiff broke the contract or did not carry out his end.
>
> The Court: Objection sustained."

These offers of proof amplify the statements made in the opposing affidavit of Mr. Barnes, President of The Barnes Foundation, on the motion for summary judgment (R. 29a-30a):

> "The circumstances surrounding the oral agreement of August 8, 1940, are too detailed and too complex to set forth in an Affidavit in opposition to a Motion for Summary Judgment. The same is true of the circumstances and events taking place over a period of two years which constitute the

Plaintiff's breach of contract as set forth in the Defendant's Answer, particularly paragraph 3(b) thereof: It is sufficient to brand as untrue the assertions of the Plaintiff in his Affidavit that he was not required by the said agreement to meet any proper standard of conduct as a member of the Defendant's teaching staff, and that he did meet such standard during the period of employment. It is likewise untrue that the Defendant engaged the Plaintiff solely to give one lecture a week. With respect to the letter of March 13, 1941, attached as Exhibit 'E' to the Plaintiff's Affidavit, I can state that it was written by me in the spirit of friendly encouragement; I was trying to be as helpful to the Plaintiff as I could. The far larger part of the events and circumstances above referred to, which constitute the Plaintiff's breach of our agreement, occurred subsequent to the dispatch of that letter."

Mr. Barnes' statements were made in answer to Mr. Russell's general statements in the moving affidavit that (R. 20a-21a):

> "I entered upon my duties pursuant to said contract and none other, and performed them faithfully and precisely as required by said contract and to the best of my ability until my contract was unlawfully terminated without cause. For two years, or until December 31, 1942, I was paid for my services at the rate specified in said contract.
>
> * * * * * * *
>
> For many years prior to 1940, I had a wide reputation as a teacher, lecturer and author, and the defendant and its president, the said Albert C. Barnes, were entirely familiar with my work, reputation and qualifications. My contract called for the delivery of one lecture each week in the gallery of The Barnes Foundation, and Dr. Barnes had every reason to know and did know the general nature

and quality of the lectures which I had given and would give, and I have given to their proper preparation and delivery my best efforts at all times.

I deny unequivocally that in any respect whatever I have failed, as alleged, to meet any proper standard of 'personal and professional conduct inherent in' my position as a member of the defendant's teaching staff, and I reiterate that such alleged standard, nowhere specified or described in the said answer, was never mentioned or discussed in any way by Dr. Barnes or other representatives of defendant and myself. Contrary to the averments made in the said answer, Dr. Barnes, defendant's president, had often expressed to me his entire satisfaction with my lectures and work at the Foundation, as, for example, in a letter of March 13, 1941, sent after the delivery of approximately ten lectures, a copy of which is attached hereto, made a part hereof and marked Exhibit 'E'."

If these conflicting statements by Mr. Barnes and Mr. Russell in their respective affidavits as to the nature of Mr. Russell's performances created no "issue of material fact" within the meaning of Rule 56, then no issue is ever created.

We believe that Rule 56 has been misconstrued by the Third Circuit and that Circuit has mistakenly arrogated to itself the determination of the two issues of fact clearly created by the pleadings and the affidavits submitted on the motion: Did Mr. Russell deliver the type of lecture contemplated by the agreement and did he adequately perform the duties of "a member of the teaching staff" of The Barnes Foundation?

Summary judgment under Rule 56 was not intended to displace a trial or to confer upon the Court the power to determine a disputed issue without evidence. It was intended only to be used to determine whether there was

any issue of material fact to try. Any other effect is clearly unconstitutional under the Fifth Amendment.

The action of the Third Circuit in itself passing on the factual issues in the case at bar is contrary to the interpretations by the other Circuits of the power of the courts to pass on facts under Rule 56. (See, e. g., *Fletcher* v. *Evening Star Newspaper Co.*, 114 Fed. (2d) 582 (App. D. C. 1940); *Miller* v. *Miller*, 122 Fed. (2d) 209 (App. D. C. 1941); *Cohen et al.* v. *Eleven West 42nd Street, Inc.*, 115 Fed. (2d) 531 (C. C. A. 2nd 1940); *Beidler & Bookmyer* v. *Universal Ins. Co.*, 134 Fed. (2d) 828 (C. C. A. 2nd 1943); *Port of Palm Beach Dist.* v. *Goethals*, 104 Fed. (2d) 706 (C. C. A. 5th 1939); *Whitaker* v. *Coleman*, 115 Fed. (2d) 305 (C. C. A. 5th 1940); *Campana Corp.* v. *Harrison*, 135 Fed. (2d) 334 (C. C. A. 7th 1943); *Ramsouer* v. *Midland Valley R. Co.*, 135 Fed. (2d) 101 (C. C. A. 8th 1943).

This Court has not yet ruled explicitly on what the correct interpretation of Rule 56 is in this matter. In view of the unfortunate construction necessarily placed upon that rule in this case by the action of the Third Circuit there is urgent need for this Court to make the ruling which will eliminate all doubt on this point and which will assure a trial.*

2. Interpretation of Rule 43 in Conflict with this Court's and Other Circuit Court Decisions.

A basic reason for the Third Circuit's refusal to allow a trial in the case at bar rests in its belief that it is bound by state law on all questions of admissibility of evidence.

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* We do not here discuss the trial court's refusal to permit a jury trial, although the granting of defendant's motion for such a trial would in no way have inconvenienced either the court or the parties. The refusal was merely symptomatic of the general blindness to the need of permitting the defendant an opportunity to present its side of the case.

It is true that under 28 U. S. C. A. §724, popularly known as the Conformity Act, that was the rule. But, as this Court pointed out in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1 (1941), the adoption of the Federal Rules of Civil Procedure under the authority granted by 28 U. S. C. A. §723 (b) and (c) repealed §724 at least to the extent that the Rules regulate "procedure," which Mr. Justice Roberts aptly defined as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." (*Sibbach* case, p. 14).

The Third Circuit has consistently and progressively disregarded this change in the law. In 1938 in *Peters* v. *Mutual Life Insurance Co. of New York*, 101 Fed. (2d) 9, it excluded expert testimony because of a state rule. In 1940 in *Dairymen's Milk Co. of Pittsburgh* v. *McCormick Co.*, 114 Fed. (2d) 736, it excluded a hypothetical question for the same reasons. Now, again, in the case at bar, and this time to the exclusion not of some evidence but of all evidence, the Third Circuit has held itself bound by the law of Pennsylvania instead of following the Federal rule.*

This limited conception of the court's powers under Rule 43, which expressly favors the admissibility of evidence under whichever available rule may prove more liberal, is in conflict with the decisions of other Circuits. (See, e.g., *Boerner* v. *U. S.*, 117 Fed. (2d) 387 (C. C. A. 2nd 1941) cert. denied 313 U. S. 587; *Aetna Life Ins. Co.* v. *McAdoo*, 106 Fed. (2d) 618 (C. C. A. 8th 1939); *National Battery Co.*

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* Nor can this exclusion be justified as an application of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938) as was the case in *Long* v. *Morris*, 128 Fed. (2d) 653 (C. C. A. 3rd 1942) when the substantive aspect of the parole evidence rule was in question. Only the procedural aspects of the parole evidence rule are involved in the case at bar. (See analysis of the extent of the operation of that rule by Mr. Justice Rutledge in *Fox* v. *Johnson & Wimsatt, Inc.*, 127 Fed. (2d) 729, 735 footnote 12 (App. D. C. 1942)).

v. *Levy*, 126 Fed. (2d) 33 (C. C. A. 8th 1942); cert. denied 316 U. S. 697).

Rule 43 was intended to liberalize the admissibility of evidence and to permit the Federal Courts to develop their own rules (See Moore, Federal Practice, vol. 3, §43.01 and §43.02; Callaghan & Ferguson, Evidence and the New Federal Rules of Civil Procedure, 45 Yale Law Journal 622, 47 *id.* 194; Thomas F. Green, Jr., The Admissibility of Evidence under the Federal Rules, 55 Harvard Law Rev. 197). The interpretation placed on this Rule by the Third Circuit would not only destroy its primary purpose of liberalizing the rules of evidence, but would forever prevent the achievement of any uniformity on rulings as to evidence in the Federal Courts. Again, this is a question which has not yet been passed on by this Court and which should be authoritatively settled in favor of uniform liberal rules of evidence, applicable throughout the Federal system. It is a question on which a wrong answer, combined with a misapplication of Rule 56, has here produced denial of a trial and deprived the defendant of all opportunity to be heard.

We come now to the question of whether the evidence offered in this case would have been admissible under Federal law, even assuming arguendo the court's finding that it was inadmissible under Pennsylvania law.*

The leading decision of this Court as to admissibility of evidence to explain the terms of a contract is *Porto Rico Sugar Co.* v. *Lorenzo*, 222 U. S. 481 (1912) in which Mr. Justice Holmes, speaking for the court, held the evidence was proper.

In the Second Circuit in *Arbuckle* v. *Lumbermen's Mutual Casualty Co. of Ill.*, 129 Fed. (2d) 791 (1942) the court held that evidence was admissible to explain language in a

* We believe as to this, that the Court misapplied that law as well.

detailed insurance contract to the effect that the automobile insured was to be "principally used at R. F. D. #2, Callicoon, N. Y., and vicinity and garaged at same" and that the question of the meaning of this language was one of fact for the jury. Similarly such evidence has been held admissible in almost all other Circuits. (See, e.g., *Howell* v. *Grocers, Inc.*, 2 Fed. (2d) 499 (C. C. A. 6th 1924); *Buhl* v. *Kavanagh*, 118 Fed. (2d) 315 (C. C. A. 6th 1941); *Franklin et al.* v. *American Nat. Ins. Co.*, 135 Fed. (2d) 531 (C. C. A. 10th 1943); *Lincoln Nat. Life Ins. Co.* v. *Horwich et al.*, 115 Fed. (2d) 892 (C. C. A. 7th 1940); *Eustis Packing Co.* v. *Martin*, 122 Fed. (2d) 648 (C. C. A. 5th 1941); *Fox* v. *Johnson & Wimsatt Inc.*, 127 Fed. (2d) 729 (App. D. C. 1942).)

The Third Circuit is in conflict with this weight of Federal law in favor of admissibility of evidence to explain the meaning of a contract. The court was clearly not bound to follow any exclusionary rule of Pennsylvania but was bound instead to follow the Federal rule and thus to afford the defendant an opportunity to present its side of this controversy.

3. Importance of Questions Involved.

There is involved in this case the meaning of two vitally important Rules—Rule 56 and Rule 43. There is a conflict in the Circuits on the meaning of both rules. There is pressing need for this Court to explain them and more particularly to determine now whether Rule 43 was intended and should be used as a basis for forming a *uniform* system of authoritative federal rules of evidence or whether it expresses but a pious hope that rules of evidence will be more liberal although still bound by the non-uniformity of the state practices and the gaps of the federal equity rules of evidence. That question is of paramount importance to the bar at large and its decision should not be postponed. It

is squarely presented by the facts of the case at bar and has in this case been erroneously decided to the detriment of all future litigation in the Third Circuit. It is presented in a case in which its misconception has denied to one party its right to be heard.

The particular decision here is also fundamentally vicious in that it has completely deprived a progressive, democratic educational institution of all opportunity to be heard on a matter of vital importance to a continuation of its work and has resulted in a precedent which throws into confusion and jeopardy on each side the relationship between any teaching institution and the members of its teaching staff.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein, and that the judgment of the District Court for the Eastern District of Pennsylvania be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

THE BARNES FOUNDATION,

By GERALD A. GLEESON,
SOIA MENTSCHIKOFF,
Counsel for Petitioner.

Exhibit A.

Rules of Civil Procedure for District Courts, Rule 43, 28 U. S. C. A. following Section 723c:

Rule 43. EVIDENCE.

(a) *Form and Admissibility.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

(b) *Scope of Examination and Cross-Examination.* A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

(c) *Record of Excluded Evidence.* In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by

the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(d) *Affirmation in Lieu of Oath.* Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) *Evidence on Motions.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

Rules of Civil Procedure for District Courts, Rule 56, 28 U. S. C. A. following Section 723c:

Rule 56. SUMMARY JUDGMENT.

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time specified for the

hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit

affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

IN THE

Supreme Court of the United States

October Term, 1944

No. 488

THE BARNES FOUNDATION,
Petitioner

vs.

BERTRAND RUSSELL,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS RAEBURN WHITE,
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WHITE & WILLIAMS,
Of Counsel.

The Legal Intelligencer, 222 N. 15th St., Phila. 2

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COUNTER-STATEMENT OF THE CASE

This suit was an action for breach of contract by Bertrand Russell, respondent, against The Barnes Foundation, a corporation, petitioner. The contract of employment on which the suit is based reads as follows:

"THE BARNES FOUNDATION
Merion
Montgomery County
Pennsylvania

August 16, 1940

Mr. Bertrand Russell,
Fallen Leaf Post Office,
Lake Tahoe, California

Dear Mr. Russell:

We confirm herewith the verbal agreement made with you on August 8, 1940:—

We agree to engage you as a member of the teaching staff of the Barnes Foundation at a salary of eight thousand ($8,000) dollars per year, payable in twelve (12) equal monthly installments, on the fifteenth day of each month.

The agreement is to extend for a period of five (5) years, dating from January 1, 1941. If, during the period of the aforesaid agreement, your personal affairs should make it necessary or advisable to terminate the contract, we agree that such a termination may be effected at the end of our school year: namely May 31st.

Your service to the Foundation will consist of one lecture each week during the school year which extends from October 1st to May 31st inclusive, each lecture to be delivered in the gallery of the Barnes Foundation, at Merion, Pennsylvania.

Yours very truly,

THE BARNES FOUNDATION

Paul Hogan Witness Albert C. Barnes
President

(CORP. SEAL)

Sarah M. Cleaver Witness N. E. Mullen
Secretary-Treasurer

I, Bertrand Russell, hereby agree to the terms and conditions of the above agreement entered into between myself and the Barnes Foundation.

Mary Mullen
Cynthia F. Stine Witnesses (2) Bertrand Russell"

The contract which appears in the petition at pp. 2-3 is not the contract on which the suit is based. Respondent duly entered upon the performance of his duties and gave the lectures as agreed for two years. Shortly before the end of the second year, petitioner notified him that his contract would be terminated as of the end of that year, but offered to continue his engagement to perform the same services at a reduced salary of $6000 a year (7a). No reason was given for the action taken. Respondent has received no salary since December 31, 1942.

This suit was begun by the filing of a complaint on January 18, 1943, to recover respondent's loss by reason of petitioner's breach of the contract. Petitioner filed an answer alleging that the parties had agreed to certain oral terms of the contract which were inconsistent with and not included in the written instrument and that these oral agreements had been broken by respondent, thus excusing petitioner for terminating the contract.

The oral terms which it was alleged the parties had agreed to were (1) that respondent would not deliver popular lectures after a certain date, and (2) that he would conform to a certain undefined "standard of personal and professional conduct", which it was alleged was agreed upon prior to the signing of the written contract.

Respondent moved for summary judgment in his favor pursuant to Rule 56 of the Rules of Civil Procedure, which provides in paragraph (c):

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Respondent supported his motion by an affidavit which, without admitting the materiality of the averments in the answer, which attempted to set up oral terms not incorporated in the written contract, showed that there was no genuine issue of fact even as to said immaterial averments. Petitioner filed a counter-affidavit which added nothing to the case except to give more details as to the alleged violation of the alleged oral terms.

After argument, the court entered summary judgment in favor of respondent, but did not assess the damages, directing that the case proceed to trial for the determination of the amount of such damages (see opinion of the court, 32a, 50 Fed. Supp. 174).

An appeal was then taken to the Circuit Court of Appeals which was dismissed because there was no final judgment in the court below (136 Fed. (2d) 654). The case proceeded to trial to determine the amount of damages and on November 16, 1943, the court filed its opinion and findings that "plaintiff has suffered a loss of $20,000 as a result of the defendant's breach of contract of employment" (179a, 52 Fed. Supp. 827). Judgment was entered accordingly. Upon appeal to the Circuit Court of Appeals, the judgment was affirmed (192a, 143 F. (2d) 871).

The description of The Barnes Foundation on page 2 of the petition is contained in a pamphlet which the court excluded from evidence (151a). There is no basis in the record for the alleged quotation from John Dewey on the same page: the statement that Mr. Russell was employed "at the height of the then current controversy between Bertrand Russell and the College of the City of New York" has no support in the record; the statement on page 4 of the petition that defendant terminated Mr. Russell's engagement for cause is unsupported by any evidence; the statement on the same page that "without any opportunity to the Foundation to present its evidence, summary judgment under Rule

56 was granted in favor of Mr. Russell on his bare statement that he had performed his duties" is far from accurate. The action of the courts below was based on the fact that petitioner had alleged nothing in its answer which could serve as a defense to the action brought by the respondent.

ARGUMENT

The basis of the petition appears to be that the court below erroneously interpreted Rule 56 of the Federal Rules of Civil Procedure in conflict with interpretations by other circuits, and interpreted Rule 43 in conflict with decisions of this court and circuit courts other than the court below. Neither of these contentions, we respectfully submit, has any basis in fact or law.

1. *Interpretation of Rule 56*

The argument of the petitioner (Petition, p. 8) is based on the alleged error of the District Court in refusing certain offers of proof. These offers, as shown by the one alleged to be typical (Petition, p. 8), were made at the trial for the sole purpose of determining the amount of damages, which trial took place after judgment had been entered for respondent. It is obvious, without discussion, that the offer quoted on page 8 of the petition, and others of similar nature, had no relevancy to the issue then being tried. The contradictions in the affidavits quoted on pages 9 and 10 of the petition relate entirely to the alleged oral agreement of which no evidence could have been admitted. The issues so raised were therefore immaterial and the motion for summary judgment was properly granted.

The cases cited by the petitioner on page 11 of its petition as being inconsistent with the interpretation of the court below have no relevancy.

2. *Interpretation of Rule 43*

Petitioner argues that the court's interpretation of Rule 43 is in conflict with the decisions of this court and Circuit Courts other than the court below. Its argument apparently is that the court below is in error in applying the Pennsylvania rule that oral testimony cannot be introduced to alter or add to the terms of a written contract, except in cases of fraud, accident or mistake not alleged here.

It is submitted that petitioner is in error in contending that the Pennsylvania rule is not applicable in a case of this character. See *Restatement Conflict of Laws* §597-599. That the rules of civil procedure do not affect the principle that the admissibility of evidence under circumstances such as the present is to be determined by state law is clear. The question of the admissibility of oral evidence to vary or contradict the terms of a written instrument is a question of substantive law and not merely procedure: *Long v. Morris*, 128 F. (2d) 653; *Cooper v. Brown*, 126 F. (2d) 874; *American Crystal Sugar Company v. Nicholas*, 124 F. (2d) 477; 3 *Beale, Conflict of Laws* § 599.1. There is nothing in *Sibbach v. Wilson Co.*, 312 U.S. 1, which is inconsistent with this view, the court in that case having distinctly decided that the rules of civil procedure relate only to practice and procedure, quoting the Act of Congress that "said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant". There is no conflict of decision on this point. The cases cited by petitioner have no relevancy.

But this point is really immaterial, for the rule is the same in Pennsylvania and in the United States courts that oral evidence to contradict, modify or add to a written contract is not admissible unless it is alleged that the missing terms were omitted from the writing through fraud, accident or mistake: *Seitz v. Brewers' Refrigerating Company*, 141 U.S. 510; *Maguire v. Gerstley*, 204 U.S. 489. Petitioner does not argue that the evidence would be admissible under the Pennsylvania rule. As the rule of the Federal courts is the same it is immaterial which rule is applied. The cases cited by petitioner on pages 13 and 14 of its petition are cases in which oral evidence was admitted to explain but not in any particular to contradict written contracts.

It is respectfully submitted that the petition should be denied.

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